84-1077

No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1984

HAROL WHITLEY, et.al.,

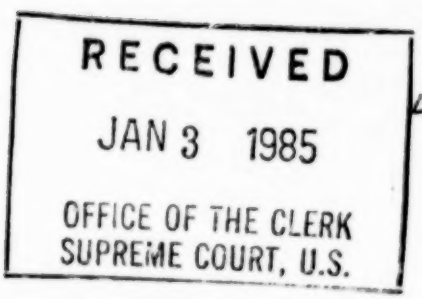
Petitioners,

v.

GERALD ALBERS

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit



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PARTIES

The parties to the proceeding in the Ninth Circuit Court of Appeals whose judgment is sought to be reviewed are as follows: Gerald Albers (respondent herein); Harol Whitley, individually and in his official capacity as Assistant Superintendent at the Oregon State Penitentiary, Hoyt C. Cupp, individually and in his official capacity as Superintendent at the Oregon State Penitentiary, J.C. Keeney, individually and in his official capacity as Assistant Superintendent at the Oregon State Penitentiary, and Robert Kennecott, individually and in his official capacity as a correctional officer at the Oregon State Penitentiary (petitioners herein).

QUESTION PRESENTED

Is the Eighth Amendment prohibition of cruel and unusual punishment violated, so as to expose prison officials to liability for damages under 42 U.S.C. 1983 for their use of deadly force in quelling a prison riot, when some evidence, viewed in a light most favorable to an injured prisoner, establishes nothing more than an unprivileged common law battery?

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PETITION FOR WRIT OF CERTIORARI

Petitioners Harol Whitley, et al., respectfully pray that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in *Albers v. Whitley, et. al.*, No. 82-3551 (October 1, 1984).

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported as *Gerald Albers v. Harold* [*sic*] *Whitley*, 743 F.2d 1372 (9th Cir. 1984). A copy of the opinion is attached to this petition as Appendix A. The opinion of the United States District Court is reported as *Albers v. Whitley*, 546 F. Supp. 726 (D. Or. 1982). A copy of that opinion is attached to this petitition as Appendix B.

JURISDICTION

The opinion of the Ninth Circuit Court of Appeals was dated and filed on October 1, 1984. The judgment sought to be reviewed was entered on the same date. Jurisdiction to review the Court of Appeals' judgment in this civil case by writ of certiorari is conferred upon this Court by 28 U.S.C. § 1254(1). This petition for writ of certiorari is filed within the 90-day period prescribed by 28 U.S.C. § 2101(c), as computed in accordance with Rule 20 and Rule 29(1) of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Civil Rights Act of 1871 (42 U.S.C. § 1983) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

1. *Summary of Facts*

The evidence, viewed in the light most favorable to the respondent, supports the following factual summary.[1]

Respondent Albers was a prisoner housed in Cellblock "A" at the Oregon State Penitentiary. He brought a claim for damages under 42 U.S.C. § 1983 after he was shot in the knee by petitioner prison officials while they were quelling a prison disturbance on June 27, 1980. Petitioner Whitley was security manager of the penitentiary; Cupp was superintendent; Keeney was an assistant superintendent; and Kennecott was a corrections officer.

On the night of June 27, 1980, several inmates in Cellblock "A" became agitated by what they viewed to be mistreatment

[1] This case was before the Ninth Circuit on review of a district court order directing judgment for petitioners, the defendants below. The facts set forth in the Statement of the Case are taken almost verbatim from the opinion of the Ninth Circuit, 743 F.2d at 1373-74, 1376. (Appendix A, App-2 - App-4). Petitioners also rely on the statement of facts in the opinion of the U.S. District Court for the District of Oregon, 546 F. Supp. at 729-31 (Appendix B, App-16 - App 22).

by prison guards of other inmates being escorted through the cellblock. Because of the ensuing commotion and the inmates' tense mood, an early "cell-in" order was given. Some inmates resisted the cell-in order and began to break furniture. One inmate, Richard Klenk, became particularly upset. After confronting two guards, he assaulted one of them. The assaulted guard left the area to report the disturbance. The other guard was taken hostage by the inmates and removed to cell 201 on the second floor of the cellblock.

After prison authorities were notified of the disturbance, security manager Whitley went to speak with Klenk. A few attempts were made to demonstrate that the inmates whom the prisoners were originally concerned about were unharmed. The disturbance, however, continued. Whitley checked the condition of the prison guard being held hostage and found him to be unharmed.

Whitley then began organizing an assault squad. At some point, prison officials discovered Klenk had a knife, and they learned he had claimed to have killed one inmate and that others would die. Klenk also threatened to kill the hostage. Whitley returned to the cellblock to see that the hostage was still unharmed. He was told by other inmates that they would protect the guard.

Respondent Albers left his cell at an inmate's request to see whether he could aid in quieting the disturbance. Albers asked Whitley if he would return with a key to the lower tier cells to allow those on the lower tier, including several elderly inmates, to remove themselves from the commotion. Whitley

said that he would return with the key. As Whitley left, he noticed the inmates had constructed a barricade that limited access to the cellblock.

The prison officials discussed the situatien and agreed that tear gas could not be used.[2] Superintendent Cupp thereupon ordered Whitley to take a squad armed with shotguns into "A" block. He gave instructions to "shoot low."

Whitley reentered the cellblock and was followed by three armed guards. There is evidence that Albers asked for the key and that Whitley screamed "shoot the bastards" as he ran toward the stairs in pursuit of Klenk. The stairway was the only route to the cell where the guard was held hostage. It was also the only route by which Albers could return to his own cell.

Warning and second shots were fired. Whitley chased Klenk to the upper tier and subdued him, with the help of several inmates, outside the door to the cell where the hostage

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[2] As the district court observed:

> Here, a decision was made by the defendants not to use tear gas or mace. There was concern whether prison officials could maneuver through the barricade and administer the gas quickly enough to assure that no harm came to the hostage. There was also concern whether gas would have the necessary effect in the relatively large area of cellblock "A." Gas would cause great discomfort to the majority of inmates who had obeyed the cell-in order and were in their cells.

546 F. Supp at 734.

Albers' testimony confirmed the prison officials' concern that tear gas would not be effective. According to Albers, prior to the prison officials' invasion of the cellblock, word had spread throughout the cellblock that gas would be used and prisoners soaked towels and sheets with water to render the gas ineffective. (Tr. 142-143).

was being held. Meanwhile, Albers was shot in the knee by Kennecott while Albers ran up the stairs behind Whitley.

The hostage guard was released unharmed. One other inmate had been shot on the stairs, and others on the lower tier also were injured by gunshot.

2. *Procedural History*

Albers filed a complaint in the federal district court for damages under 42 U.S.C. § 1983, pursuant to 28 U.S.C. § 1343.

At trial before a jury, Albers presented two experts who testified that other measures, less drastic than those taken by the prison officials, could have been employed to quell the disturbance. Albers' first expert, Mr. Brewer, testified that less drastic measures included tear gas and assault squads armed with riot batons. He opined that the use of deadly force under the circumstances of this case, taking its timing into account, was unnecessary to prevent imminent danger to the hostage or other inmates.[3] He also testified that the use of deadly force was excessive under the circumstances at the time it was used, and that reasonable corrections policy would dictate that a verbal warning be given immediately before shooting. Albers second expert, Mr. Perkins, testified that the prison authorities should have acted differently, and that

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[3] Mr. Brewer's reference to the use of "deadly force" is misleading on at least two accounts. First, the uncontradicted evidence is that Superintendent Cupp instructed the assault squad to shoot low, thereby minimizing if not eliminating the possibility that anyone would actually be killed. Second, Mr. Brewer, testified that a less drastic measure which should have been utilized — invasion by a riot squad armed with riot batons — could also result in death or serious injury given prison guards' training in the use of such weapons. (Tr. 289).

they were "possibly a little hasty in using firepower" on the inmates. Petitioners' experts controverted the testimony of Albers' experts.

At the conclusion of the trial, petitioners moved for a directed verdict on the basis that the testimony was insufficient to permit the jury to find a violation of Albers' Eighth Amendment right not to be subjected to cruel and unusual punishment. The district court granted the motion and entered a written decision. *Albers v. Whitley*, 546 F. Supp. 726 (D. Or. 1982).

Respondent appealed to the Ninth Circuit Court of Appeals pursuant to 28 U.S.C. § 1291. The Ninth Circuit reversed the judgment of the district court. It held that Albers presented sufficient evidence of an Eighth Amendment violation. It ruled that based on the expert testimony presented, "a jury could have concluded that the prison officials' 'riot plan' was hopelessly flawed and that the use of deadly force against Albers was unreasonable, unnecessary, improper and engaged in with deliberate indifference to his constitutional interests." 743 F.2d at 1376. The Ninth Circuit also addressed petitioners' qualified immunity claim. It held that upon retrial, if a jury should conclude that Albers was subjected to cruel and unusual punishment, the defense of qualified immunity would not be available to petitioners.

REASONS FOR ALLOWANCE OF WRIT

1. This case reduces to a controversy over whether prison administrators, confronted with a serious prison riot and

imminent risk of loss of life of inmates and guards, made an incorrect assessment of how best to defuse that threat and regain control of the cellblock. Plaintiff's evidence, the Ninth Circuit held, was sufficient at least to create a jury question on whether plaintiff suffered cruel and unusual punishment at the hands of prison officials. Under the Ninth Circuit's opinion, misjudgment can equate with deliberate indifference and a jury can find wantonness from evidence of imprudence. The Ninth Circuit, we submit, has laid a new foundation for Eighth Amendment analysis. On this base, the court has built an edifice that embodies principles closely akin to common law tort and drastically different from what historically and contemporarily have been recognized to reflect the spirit and purpose of the cruel and unusual punishment clause.

This case arises from a riot in an open cellblock housing over 200 inmates and located within a maximum security prison. A prison guard was held hostage for over two hours while petitioners attempted to negotiate his release from an armed inmate who repeatedly threatened to kill the guard as well as other inmates, and who reportedly had already killed one inmate. The unsuccessful negotiations took place against a background of commotion and uproar within the cellblock which included the destruction by inmates of most of the cellblock furniture. Ultimately, petitioners were successful in quelling the riot with no loss of life, although some inmates, including respondent, did incur injuries. No evidence suggested and no claim was made that petitioners continued to use force after regaining control of the cellblock or that

injuries were inflicted in retribution or retaliation for the inmates' riotous and violent conduct.

At trial, each side presented expert testimony. Plaintiff's experts were of the opinion that, although action to regain control of the cellblock was needed, the measures taken were too extreme. Mr. Brewer testified to alternative and, in his view, less drastic measures (*e.g.*, sharpshooters, riot formations, tear gas) that in his judgment could have been employed effectively. Mr. Perkins testified that prison administrators, given all the circumstances, might have been "possibly a little bit hasty" in taking the action they took to stop the riot. Defendants' experts, in contrast, believed that the action taken was appropriate, and that the alternative procedures proposed by plaintiff's experts would have been ineffective, less effective or might even have aggravated the danger. In short, one set of experts pointed to errors in the judgment of the prison administrators, the other set of experts said no error in judgment was involved.

Evidence such as that presented in this case, even cast in the light most favorable to plaintiff, does not rise to the level of an Eighth Amendment violation upon which a jury should be permitted to find liability for damages. For the Ninth Circuit to so hold is error. The Ninth Circuit's error lies in the legal standard it fashioned and applied to test whether evidence creates a jury question on a cruel and unusual punishment claim arising out of a prison riot situation. The Ninth Circuit stated:

> In our view, a proper standard deems the eighth amendment to have been violated when the force used is "so unreasonable or excessive [as] to be clearly disproportionate to the need reasonably perceived by prison officials at the time." *Jones v. Mabry*, 723 F.2d 590, 596 (8th Cir. 1983), *cert. denied*, ___U.S. ___, 104 S.Ct. 2683, 81 L.Ed.2d 878 (1984). Thus if a prison official deliberately shot Albers under circumstances where the official, with due allowance for the exigency, knew or should have known that it was *unnecessary*, Albers' constitutional right would have been infringed. . . .

743 F.2d 1375 (emphasis added).

The Ninth Circuit's opinion points to evidence that the riot was subsiding at the time of official action as support for an inference that the force used was excessive. At greater length, the lower court discussed and canvassed the conflict in the expert testimony on whether less drastic measures reasonably could have and should have been used to stop the riot. On the basis of the conflicting expert opinions, the Ninth Circuit concluded that a jury possibly could have found that "the use of deadly force against Albers was unreasonable, unnecessary, improper and engaged in with deliberate indifference to his constitutional interests." 743 F.2d 1376.[4]

The Ninth Circuit's analysis of plaintiff's constitutionally

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[4] It is questionable whether the evidence even presented a jury issue on the issue of reasonableness. The district court judge, after listening to all the evidence, determined that no reasonable jury would conclude that the force used by petitioners to restore order and security in Cellblock "A" was unreasonable:

> Defendants here were faced with a situation that had extreme potential danger to a hostage guard and to inmates. Possible alternatives to force were reasonably considered and rejected. While plaintiff's experts suggested possible riot formations, tear gas, and sharpshooter alternatives, it would be speculative to conclude that such other alternatives would have been more effective in securing the release of the hostage and the safety of the inmates. The safety of the hostage and the nonrioting inmates was of paramount importance to the defendants."

546 F. Supp. at 734.

based cruel and unusual punishment ciaim differs not a whit from the standard that would apply in a common law tort action arising from police actions in a situation where persons in the community had taken control of a nuclear power plant, held an employee of the plant hostage, and threatened to kill the hostage, and then, in an effort to gain control of the property, police shot and injured one or more people. The claim by those injured would be for tortious assault and battery. The response by police undoubtedly would be to claim the privilege of self-defense or defense of others and the privilege to use deadly force relating to a riot, which under such circumstances overlap. *See, e.g., Burton v. Waller*, 502 F.2d 1261 (5th Cir. 1974) (damages sought for death and injuries from gunfire used by police to stop student riot). The inquiry for the jury in such a case would be whether the degree of force used was unreasonable or excessive in relation either to real danger, or to danger reasonably believed to exist. To meet this standard it would have to be shown that the actor considered whether lesser force would prevent the apprehended harm. *See*, Prosser on Torts, §§ 19 and 20 (Hornbook Ed. 1971); Restatement (Second) of Torts, § 70(1), comments b and c; *Burton v. Waller, supra* at 1276-78.

Although the Ninth Circuit opinion recites language like "deliberate indifference" and "unnecessary and wanton" infliction of physical pain, the circuit court was willing to find those Eighth Amendment inquiries satisfied where there was evidence sufficient to create a jury question on the common law tort privilege of self-defense or defense of others. The

lower court unquestionably has grafted a tort standard onto the Eighth Amendment. This cannot be correct.

In the well-developed body of Eighth Amendment case law of this Court, two principal themes repeatedly are emphasized. First, the proscription against cruel and unusual punishment is addressed not only to tortuous and other barbarous methods of punishment; it extends also to the needless, callous or deliberately indifferent infliction of pain and suffering, when the degree of pain inflicted exceeds modernly tolerable limits and is totally without penological justification or purpose. *See generally Gregg v. Georgia*, 428 U.S. 153 (1976); *Rhodes v. Chapman*, 452 U.S. 337 (1981). Second, although courts must act to protect prisoners from cruel and unusual punishment, they must exercise caution in judging the actions of prison administrators. The task of prison administrators is a complex one calling for considerable expertise and judgment. Standards articulated under the Eighth Amendment must accord considerable latitude in judgment to the officials charged with prison management in order to avoid mere judicial second-guessing of the sensitive and delicate problems of prison administration. *See, e.g., Bell v. Wolfish*, 441 U.S. 520 (1979); *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977); *Pell v. Procunier*, 417 U.S. 817 (1974). Neither of these fundamental themes is accommodated by the Ninth Circuit's decision below.

The Eighth Amendment concern of cruel and unusual punishment is significantly devalued if the standard for such punishment is the same standard imposed for civil torts

between ordinary citizens. This Court recognized as much in a different Eighth Amendment context, the provision of medical services to prisoners. In *Estelle v. Gamble*, 429 U.S. 97 (1976), this Court rejected, in the strongest of terms, the notion that tort standards for medical negligence (*i.e.*, malpractice) could provide the benchmark for a claim of cruel and unusual punishment:

> an inadvertent failure to provide adequate medical care cannot be said to constitute "an unnecessary and wanton infliction of pain" or to be "repugnant to the conscience of mankind." Thus, a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend "evolving standards of decency" in violation of the Eighth Amendment.

Id. at 105-06 (footnote omitted). The decision in *Estelle* concluded that the Eighth Amendment, in the area of inmate medical needs, was addressed to a more serious evil. To constitute cruel and unusual punishment, a failure to meet an inmate's medical needs must be grave enough to "produce physical 'torture or a lingering death' " or "result in pain and suffering which no one suggests would serve any penological purpose." 429 U.S. at 103. "The infliction of such unnecessary suffering is inconsistent with contemporary standards of decency." *Ibid.*

Unlike *Estelle v. Gamble*, the concern here is not with malfeasance or nonfeasance and tort concepts of negligence. This case involves, instead, intentional action. The force employed by prison administrators, without question, was used deliberately and by design. But *Estelle v. Gamble* nevertheless makes the essential point. The cruel and unusual punishment clause was designed to address more serious affronts to human physical dignity than those generally addressed by common law tort notions. Injurious force used to stop an outbreak of life-threatening violence within prison walls may be excessive, but that does not speak to whether it also is cruel and unusual punishment. Prison administrators, in choosing to use such force, may be imprudent, unwise or unreasonable. That fact, too, fails to bear on whether the action constitutes cruel and unusual punishment.

The issue, under the Eighth Amendment, must focus squarely and directly on whether the action taken results "in pain and suffering that no one suggests would serve any penological purpose." *Estelle v. Gamble, supra.* In a prison riot setting, where there is no dispute that remedial action should have been taken, and the only disagreement is whether the degree of force used was proportionate to the perceived danger, the cruel and unusual punishment clause has no application. In that setting, the Eighth Amendment is triggered only where the force is wholly without penological purpose.

Where prison administrators are, as here, presented with a prison riot in which the lives of prisoners and guards alike are

threatened, we submit that the cruel and unusual punishment clause rarely will be implicated. In extreme or unusual instances, however, it might be. For example, if injurious force is used after prisoners have relinquished their weapons and attempted to surrender to prison authorities, such force would be without penological purpose. Similarly, force grossly disproportionate to the danger, such as an order to shoot and kill any and all prisoners out of their cells, would suggest, under these circumstances, that deadly force was used not for the proper penological purpose of regaining control, but instead to retaliate and punish everyone participating in any fashion in the disturbance. Such hypotheticals suggest the wanton infliction of unnecessary pain which the Eighth Amendment addresses; borderline disputes between experts over the most desirable or least drastic methods of controlling a prison disturbance do not.[5]

The equally serious danger of the lower court's decision is

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[5] Indeed, the testimony of Albers' experts in this case established little more than that petitioner prison officials could have employed more desirable methods to control the situation. As this Court observed in *Rhodes v. Chapman*, 452 U.S. at 348, n. 13:

> Respondents and the District Court erred in assuming that opinions of experts as to desirable prison conditions suffice to establish contemporary standards of decency. As we noted in *Bell v. Wolfish*, 441 U.S., at 543-544, n. 27, such opinions may be helpful and relevant with respect to some questions, but "they simply do not establish the constitutional minima; rather, they establish goals recommended by the organization in question." . . . Indeed, generalized opinions of experts cannot weigh as heavily in determining contemporary standards of decency as "the public attitude toward a given sanction." *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (joint opinion). We could agree that double celling is not desirable, especially in view of the size of these cells. But there is no evidence in this case that double celling is viewed generally as violating decency. . . .

that it invites second-guessing of the most sensitive decisions that prison officials are called on to make. Time and again, this Court has recognized that the task of managing prisons is extremely complex and difficult, and that the problems facing prison officials in the day-to-day operation of prisons are not susceptible to easy solutions. *Bell v. Wolfish*, 441 U.S. 520, 547 (1979). *See, e.g., Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977); *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Pell v. Procunier*, 417 U.S. 817 (1974); *Procunier v. Martinez*, 416 U.S. 396 (1974). This Court also has recognized that the task of running prisons has been delegated to the legislative and executive branches of government, not to the judiciary. The power to devise a prison system and the duty to make the wide range of judgment calls required for efficient and effective prison administration rest with state corrections officials. *Bell v. Wolfish*, 441 U.S. at 548, 562; *Meachum v. Fano*, 427 U.S. 215, 229 (1976). The case law pragmatically has acknowledged that state prison administrators, unlike judges, are experts in the management and operation of state prisons. *See Bell v. Wolfish*, 441 U.S. at 548; *Procunier v. Martinez*, 416 U.S. at 405; *Meachum v. Fano*, 427 U.S. at 229. As stated in *Procunier v. Martinez*, 416 U.S. at 404-405:

> Prison administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody. The Herculean obstacles to effective discharge of these duties are too apparent to warrant explication. Suffice it to say that the problems of

> prisons in America are complex and intractable, and more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism.

Moreover, prison officials, particularly those in maximum security facilities such as the Oregon State Penitentiary, must supervise and attempt to rehabilitate inmates who are "not usually the most gentle or tractable of men and women." *Johnson v. Glick*, 481 F.2d 1028 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973) (Friendly, J.). Given limited space and limited resources, prison officials must attempt to maintain order, discipline, and above all the safety and security of prison inmates and corrections personnel. It is essential in pursuit of these objectives that prison officials maintain a regime of close supervision and discipline, *Rhodes v. Chapman*, 452 U.S. at 350, for "[t]he danger of prison riots is a serious concern, shared by the public as well as by prison authorities and inmates." *Id.* at 349, n.14.

For these and other reasons,

> [p]rison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel and to prevent escape or unauthorized entry. . . .
>
> . . . Prison administrators should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain internal security.

Bell v. Wolfish, 441 U.S. at 547.

When a prison riot erupts, however, the task of prison officials is to restore, rather than to attempt to maintain, order and discipline. In the judgment of prison officials involved at the scene of the riot, drastic and immediate measures may be deemed necessary to achieve this objective. Prison officials must be accorded wide latitude in their tasks of quelling the disturbance and of restoring order and security. They should not be deterred in the pursuit of their lawful and immediate objectives by the fear that one false step, no matter how well intentioned, may subject them to future liability at the hands of prisoners who may incur injury or even death as a result of measures prison officials deem necessary to bring an end to the chaos.

The tort-like standard articulated and applied by the Ninth Circuit not only fails to accord wide latitude to the judgment of prison administrators, it fails to accord any meaningful latitude at all. Prison administrators are left to walk a fine line. They dare not misjudge whether less drastic measures would be as effective to regain control; they dare not mistakingly estimate that the level of force used is proportionate to the threat posed by the riot; they dare not be less than perfectly reasonable and prudent. If they even arguably deviate from the most reasonable course, a prisoner-plaintiff may be able to find an expert who, judging the administrators' actions by hindsight and in the tranquil environment of life outside prison walls, will conclude that the administrators acted "a little bit hasty," or that they first should have

experimented with other means to quell the riot. Liability can attach even though other experts conclude that the action taken was eminently appropriate, reasonable and sound. The Ninth Circuit's decision thus, in short, invites the trier of fact to second-guess fully the judgments made by prison officials as they attempt to react to life-threatening emergencies within institutional walls.

To meet the initial burden of proving an Eighth Amendment violation, it should not be sufficient for a prisoner merely to present some testimony that less drastic methods than those employed by prison officials equally may have been effective in quelling the disturbance, freeing prison officials held hostage, and restoring order and security. Nor should it be sufficient for a prisoner merely to show that the prison officials should have known that the situation was not as severe as they perceived it to be, thus calling for less force than actually employed. All such evidence does, without more, is prove a prima facie tort case.

An appropriate Eighth Amendment standard of conduct would subject prison officials to liability for their action in the course of a prison riot or disturbance where one or more hostage is being held only if they act wantonly, in a manner grossly disproportionate to the situation as perceived, or totally without penological justification. Such a standard would embody the concept of punishment that is cruel and unusual, and such a measure would not unduly hamper prison officials in the performance of their duty.

2. Having announced a new "unreasonable force" Eighth Amendment standard under guise of a "deliberately indifferent" rubric, the Ninth Circuit proceeded to strip petitioner prison officials of their right to claim qualified immunity. The lower court's holding that no qualified immunity defense was available to petitioners conflicts with this Court's recognition that public officials may claim qualified immunity in § 1983 actions when a constitutional right is not clearly established at the time an action occurred. *See Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Procunier v. Navarette*, 434 U.S. 555 (1978). *See also, Davis v. Scherer*, 468 U.S. ___, 104 S.Ct. 3012 (1984). If this Court should reach the immunity question, in the event it approves of the Ninth Circuit's finding of a potential Eighth Amendment violation, it nevertheless should grant review and reverse the circuit court decision to rectify the anomoly.

The Ninth Circuit concluded that a jury's finding that prison officials subjected an inmate to cruel and unusual punishment necessarily would negate any claim that the officers acted in good faith and thus were entitled to the defense of qualified immunity. The court said:

> The two findings are mutually exclusive. "Those 'deliberately indifferent' to the [plaintiff's right] . . . could not show that they had not violated 'established statutory or constitutional rights of which a reasonable person would have known.'" *Haygood v. Younger*, 718 F.2d at 1483-84. *See Miller v. Solem*, 728 F.2d at 1025. Similarly, deliberate indifference to Albers' right to be free of cruel and unusual punish-

> ment would violate a right "clearly established at the time of the conduct at issue." *Davis v. Scherer*, 468 U.S. ___, ___, 104 S.Ct. 3012, 3021, 82 L.Ed.2d 139 (1984).

743 F.2d at 1376. The principal flaw in this reasoning, of course, is that lower court's civil assault and battery standard for evaluating official response to prison riots previously had not been announced.[6]

In *Procunier v. Navarette*, 434 U.S. at 565, this Court ruled that a claim of qualified, "good faith" immunity by prison officials could not be rejected as a matter of law, "[b]ecause they could not reasonably have been expected to be aware of a constitutional right that had not yet been declared. . . ." Drawing on this precedent, the Court stated in *Harlow v. Fitzgerald*, 457 U.S. at 818, that "government officials are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." As this Court explained,

> [i]f the law at [the time an action occurred] was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful.

Ibid.

In analyzing the availability of the qualified immunity defense, the Ninth Circuit failed to focus on whether, in the

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[6] In fact, under state law, prison officials are immune from liability for "[a]ny claim arising out of riot, civil commotion, or mob action or out of any act or omission in connection with the prevention of any of the foregoing." Or. Rev. Stat. § 30.265(3)(e).

context of a prison riot, prisoners had a clearly established constitutional right to be free from the use of unreasonable force. Assuming for the sake of argument that the Ninth Circuit correctly concluded that merely unreasonable force to quell a prison riot is forbidden by the Eighth Amendment, such a standard was not clearly established when the prison outbreak in this case occurred. Until the Ninth Circuit's decision in this case, only one other circuit court apparently had enunciated a reasonable force rule for prison officials, but that announcement was made with regard to a due process claim by a pre-trial detainee in a case that did not arise from a prison riot. *See, Ridley v. Leavitt*, 631 F.2d 358 (4th Cir. 1980) ("only reasonable force under the circumstances may be employed"). *Cf. King v. Blankenship*, 636 F.2d 70 (4th Cir. 1980) ("unjustified striking, beating or infliction of bodily harm upon a prisoner . . . without just cause"). In fact, the vast majority of the circuit courts that have analyzed prisoner § 1983 claims based either on the Eighth Amendment or the Due Process Clause have followed Judge Friendly's approach in *Johnson v. Glick*, 481 F.2d at 1033:

> In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and *whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm*. . . .

(Emphasis added).[7]

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[7] *See, e.g., Norris v. District of Columbia*, 737 F.2d 1148 (D.C. Cir. 1984);

(Footnote continued on next page)

The Ninth Circuit, thus, had no basis for concluding, sub silentio, that the standard it employed was "clearly established" Eighth Amendment law. Its cavalier treatment of petitioners' immunity warrants this Court's attention and correction.

CONCLUSION

The Ninth Circuit enunciated and applied in this case a standard of conduct that potentially subjects state prison officials to liability for damages under 42 U.S.C. § 1983 and the Eighth Amendment any time experts disagree that the force used to quell a prison riot and to restore order and internal security was reasonable. Such a standard goes against the very grain of the Eighth Amendment. Consistent with this Court's prior decisions, state prison officials must be accorded a broader range of discretion within which to adopt and implement policies and procedures relating to internal prison security. They should not be subjected to liability in damages under § 1983 just because others may feel that the policies and procedures they invoked in a prison riot were less desirable than methods which, in hindsight, arguably could have been used.

(Footnote continued from previous page)

Smith v. Iron County, 692 F.2d 685 (10th Cir. 1982); *Martinez v. Rosado*, 614 F.2d 829 (2d Cir. 1980). *See also Arroyo v. Schaefer*, 548 F.2d 47 (2d Cir. 1977) ("[t]here must be present 'circumstances indicating an evil intent, or recklessness, or at least deliberate indifference to the consequences of his conduct for those under his control or dependent upon him' "); *Clemmens v. Greggs*, 509 F.2d 1338 (5th Cir. 1975) ("[t]he essence of punishment is the intentional infliction of penalty or harm upon another. At the very least punishment comprises conduct so grossly negligent that intent may be inferred from its very nature"); *Little v. Walker*, 552 F.2d 193 (7th Cir.) *cert. denied*, 435 U.S. 932 (1977) (unnecessary and wanton infliction of pain violates Eighth Amendment).

This Court should enunciate the appropriate standard to be applied to § 1983 claims based on the Eighth Amendment and arising out of prison riot situations. The Court should grant this petition, issue a writ of certiorari, and reverse the Ninth Circuit's decision.

Respectfully submitted,

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APPENDIX A

Gerald ALBERS, Plaintiff-Appellant,

v.

Harold [*sic*] WHITLEY, et al.,

Defendants-Appellees.

No. 82-3551.

United States Court of Appeals,

Ninth Circuit.

Argued and Submitted Nov. 10, 1983.

Decided Oct. 1, 1984.

[Names of counsel omitted in printing]

BEFORE: WRIGHT, CANBY and BOOCHEVER, Circuit Judges.

CANBY, Circuit Judge:

Plaintiff Albers appeals from a final judgment entered by the district court upon a directed verdict in favor of defendants. *Albers v. Whitley*, 546 F. Supp. 726 (D. Or. 1982). The lower court's ruling was issued following a 3-day jury trial. Albers sought compensatory and punitive damages against defendants pursuant to 42 U.S.C. § 1983, alleging violations of his eighth and fourteenth amendment rights. He also requested damages under the Oregon Tort Claims Act for pendent state claims. We reverse in part the district court's judgment verdict and remand for a new trial. We affirm as to the pendent state claims.

FACTS

Albers was a prisoner whose claims arise from his having been shot in the knee by defendant prison officials while they

were quelling a prison disturbance in "A" Block of the Oregon State Penitentiary on June 27, 1980. Cellblock "A" consists of two tiers and houses more than 200 inmates. The only reasonable mode of access between the two tiers is a connected stairway. The stairway is separated from the lower tier by a barred door. Prison officers may enter the cellblock from either end, on either tier and can control entry into either tier by means of barred walkways. Defendant Whitley was security manager of the penitentiary; defendant Keeney was an assistant superintendent; and defendant Kennecott was a corrections officer.

On the night of June 27, 1980, some inmates in cellblock "A" became agitated about what they viewed as mistreatment of other inmates by prison guards. Because of the ensuing commotion and the inmates' tense mood an early "cell-in" order was given.

Some inmates resisted and one inmate, Richard Klenk, became particularly upset. He confronted two guards and assaulted one. After the assaulted guard left the cellblock, some inmates began to break furniture. The remaining guard was moved to a safer area by several helpful inmates but was kept hostage.

Prison authorities were notified and defendant Whitley went to speak with Klenk. A few attempts were made to demonstrate that the inmates whom the prisoners were originally concerned about were unharmed, but the disturbance continued.

Whitley checked the condition of the prison guard being held hostage and found him unharmed. He then began organizing an assault squad. At some point the prison officials discovered that Klenk had a knife and had claimed that one inmate had been killed and that others would die.

Whitley returned to the cellblock to see that the hostage guard was still unharmed, and was told by other inmates that they would protect the guard. Whitley then spoke with Albers who had left his cell at an inmate's request to see whether he could aid in quieting the disturbance. Albers asked Whitley if he would return with a key to the lower tier cells to allow those on the lower tier, including several elderly inmates, to remove themselves from the commotion. Whitley said that he would return with the key. When Whitley left, he noticed a barricade had been constructed, limiting access to the cellblock.

The prison officials agreed that their only feasible alternative was to arm a squad with shotguns and invade the cellblock. Cupp ordered the squad to "shoot low."

When Whitley reentered the cellblock he was followed by three armed guards. There is evidence that Albers asked for the key and Whitley screamed "shoot the bastards" and ran toward the stairs in pursuit of Klenk. The stairway was the only route to the cell where the guard was held hostage; it was also the only route by which Albers could return to his own cell.

Warning and second shots were fired. Whitley chased Klenk to the upper tier. Albers ran up the stairs behind Whitley and was shot in the knee by Kennecott. Klenk was subdued by Whitley with the help of several inmates. The hostage guard was released unharmed. One other inmate had been shot on the stairs and others on the lower tier also were harmed by gunshot. Albers sustained severe nerve damage to his lower left leg, with residual paralysis, and mental and emotional distress.

The issues on appeal are (1) whether there was evidence from which a jury could conclude that Albers was deprived of any constitutional rights; (2) whether defendants are protected by qualified immunity; and (3) whether Albers' state law claims are barred by the Oregon Tort Claims Act.

DISCUSSION

To establish a prima facie case under section 1983, Albers was required to show (1) that the conduct he complained of was committed by defendants and under color of state law, and (2) that this conduct deprived Albers of rights, privileges or immunities secured by the Constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908, 1912, 68 L.Ed.2d 420 (1981). There is no question that defendant prison authorities were acting under color of state law. Our focus is therefore upon deprivation of federally protected rights. It is not enough for Albers to show that he may have been the victim of a state-law tort; he must show a violation of the Constitution or a federal statute. *Baker v.*

McCollan, 443 U.S. 137, 142, 99 S.Ct. 2689, 2693, 61 L.Ed.2d 433 (1979).

The right upon which Albers relies is his right under the eighth amendment not to be subjected to cruel and unusual punishment.[1] Punishment has been characterized as cruel and unusual when it is incompatible with "the evolving standards of decency that mark the progress of a maturing society," *Trop v. Dulles*, 356 U.S. 86, 101, 78 S.Ct. 590, 598, 2 L.Ed.2d 630 (1958), and when it involves an unnecessary and wanton infliction of pain or is grossly disproportionate to the severity of the crime. *See Solem v. Helm*, ___ U.S. ___, 103 S.Ct. 3001, 3006, 77 L.Ed.2d 637 (1983); *Rhodes v. Chapman*, 452 U.S. 337, 346, 101 S.Ct. 2392, 2399, 69 L.Ed.2d 59 (1981); *Estelle v. Gamble*, 429 U.S. 97, 102-03, 97 S.Ct. 285, 290 50 L.Ed.2d 251 (1976). A formal intent to punish is not required; unjustified striking, beating or infliction of bodily harm upon a prisoner by or with the authorization of state officials may be sufficient to violate the eighth amendment. *See, King v. Blankenship*, 636 F.2d 70, 72 (4th Cir. 1980). It is difficult to draw a precise line at which the application of force becomes unconstitutional, but "unnecessary, unreasonable, and grossly" excessive force qualifies. *Williams v. Mussomelli*, 722 F.2d 1130, 1134 (3d Cir. 1983).

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[1] We agree with the district court that Albers is not asserting an independent violation of fourteenth amendment due process. 546 F. Supp. at 732 n. 1. There is consequently no need to consider whether Albers' protections under that clause differ in any way from those under the eighth amendment. *See Williams v. Mussomelli*, 722 F.2d 1130 (3d Cir. 1983).

All of these general standards require adaptation however, to fit the facts of Albers' case. Without question, shooting a prisoner in the knee would qualify as cruel and unusual if it were simply done as punishment for crime or bad behavior. Here, however the shooting occurred in the course of a forcible response to a prison emergency. "Prison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel and to prevent escape or unauthorized entry." *Bell v. Wolfish*, 441 U.S. 520, 547, 99 S.Ct. 1861, 1878, 60 L.Ed.2d 447 (1979). Moreover, those authorities must be allowed a reasonable latitude for the exercise of discretion in determining the appropriate response to a crisis; a measure that in retrospect appears not to have been necessary might have seemed very necessary to a reasonable prison administration at the time it was taken. *See id*; *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied*, 414 U.S. 1033, 94 S.Ct. 462, 38 L.Ed.2d 324 (1973).

On the other hand, the latitude accorded to prison authorities does not mean that they are authorized to use any amount of force, however great. *Ridley v. Leavitt*, 631 F.2d 358, 360 (4th Cir. 1980). In our view, a proper standard deems that eighth amendment to have been violated when the force used is "so unreasonable or excessive to be clearly disproportionate to the need reasonably perceived by prison officials at the time." *Jones v. Mabry*, 723 F.2d 590, 596 (8th Cir. 1983), *cert. denied*, ___U.S. ___, 104 S.Ct. 2683, 81 L.Ed.2d 878 (1984). Thus if a prison official deliberately shot Albers under circumstances where the official, with due allowance for the

exigency, knew or should have known that it was unnecessary, Albers' constitutional right would have been infringed. Similarly, if the emergency plan was adopted or carried out with "deliberate indifference" to the right of Albers to be free of cruel unusual punishment, when the eighth amendment has been violated. *See, Haygood v. Younger*, 718 F.2d 1472, 1482-83 (9th Cir. 1983), *petition for rehearing en banc granted*, 729 F.2d 613 (9th Cir. 1984); *Miller v. Solem*, 728 F.2d 1020, 1024 (8th Cir. 1984). This "deliberate indifference" standard arose in cases where prisoners were denied proper medical care, and it was designed to differentiate violations of constitutional rights from mere malpractice. *See, Estelle v. Gamble*, 429 U.S. 97, 104-106, 97 S.Ct. 285, 291-292, 50 L.Ed.2d 251 (1976). The standard may appropriately be applied to test the constitutionality of other exercises of professional judgment by prison officials that result in harm to prisoners. *See, Haygood v. Younger*, 718 F.2d at 1482-83; *Miller v. Solem*, 728 F.2d at 1024. So applied, "deliberate indifference" goes well beyond negligence and amounts to the " 'unnecessary and wanton infliction of pain' . . . proscribed by the Eighth Amendment." *Estelle v. Gamble*, 429 U.S. at 104 (quoting *Gregg v. Georgia*, 428 U.S. 153, 173, 96 S.Ct. 2909, 2925, 49 L.Ed.2d 859 (1976)).

Albers contends that he presented sufficient evidence to permit a jury to find that unreasonable, disproportionate and unnecessary force was used against him, and that it was used with deliberate indifference to his constitutional right. The district court, referring to uncontradicted evidence that defen-

dants were faced with a prison uprising and that an inmate armed with a knife had threatened to kill a hostage, held that the defendants' actions, even in hindsight, could not be viewed as unreasonable. The court accordingly directed a verdict for defendants. Our review of the record convinces us that the district court erred in so doing.

The district court could properly direct a verdict for defendants only if, after viewing the evidence as a whole and drawing all possible inferences in favor of Albers, it found no substantial evidence that could support a jury verdict in his favor. *California Computer Products, Inc. v. IBM*, 613 F.2d 727, 732-34 (9th Cir. 1979). The district judge was not entitled to resolve contradictions in the evidence, *Autohaus Brugger, Inc. v. SAAB Motors, Inc.*, 567 F.2d 901, 909 (9th Cir.) *cert. denied*, 436 U.S. 946, 98 S.Ct. 2848, 56 L.Ed.2d 787 (1978), or to pass upon the credibility of witnesses. *Fountila v. Carter*, 571 F.2d 487, 490 (9th Cir. 1978). Those are jury functions.

The record discloses numerous instances of conflicting testimony regarding excessive use of force. While the evidence regarding the threatening behavior of inmate Klenk was uncontradicted, there was testimony that the general disturbance in the cell block [*sic*] was subsiding by the time that the defendants stormed it with shotguns. The jury might have believed that conditions were so improved that it was or should have been apparent to defendants, and have called for less force. *See Ridley v. Leavitt*, 631 F.2d 358 (4th Cir. 1980). Both plaintiff and defendants presented expert testimony on the propriety of the prison authorities' actions

during the prison disturbance. It was the jury's function to weigh the experts' testimony on the basis of each expert's experience, knowledge, and opportunity to observe. *See, Cockrum v. Whitney*, 479 F.2d 84, 86 (9th Cir. 1973).

Albers' expert, Mr. Lou Brewer, testified that the use of deadly force under the circumstances of this case, taking its timing into account, was unnecessary to prevent imminent danger to either the hostage or other inmates. He also testified that the use of deadly force was excessive under the circumstances at the time it was used, and that reasonable corrections policy would dictate that there be a prior verbal warning immediately before shooting. Albers [*sic*] second expert, Mr. Lee Perkins, testified that the prison authorities should have acted differently, and that they were "possibly a little hasty in using firepower" on the inmates.

Although this testimony was controverted by defendants' experts, Mr. W. James Estelle, Jr. and Mr. Roger W. Crist, it is more than possible that a jury could have concluded that the prison officials' "riot plan" was hopelessly flawed and that the use of deadly force against Albers was unreasonable, unnecessary, improper and engaged in with deliberate indifference to his constitutional interests. We hold that there was sufficient evidence presented from which a jury applying the proper eighth amendment standard could have found that plaintiff's eighth amendment rights were violated. Consequently, we must reverse the judgment of the district court and remand for

a new trial.

QUALIFIED IMMUNITY

One final note should be taken of the qualified immunity defense claim. Under *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), government officials "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818, 102 S.Ct. at 2738. This is an objective standard.

As we noted in *Haygood, supra*, however, there is overlap between our eighth amendment analysis and the qualified immunity defense. A finding of deliberate indifference is inconsistent with a finding of good faith or qualified immunity. The two findings are mutually exclusive. "Those 'deliberately indifferent' to the [plaintiff's right] . . . could not show that they had not violated 'established statutory or constitutional rights of which a reasonable person would have known.'" *Haygood v. Younger*, 718 F.2d at 1483-84. *See, Miller v. Solem*, 728 F.2d at 1025. Similarly, deliberate indifference to Albers' right to be free of cruel and unusual punishment would violate a right "clearly established at the time of the conduct at issue." *Davis v. Scherer*, 468 U.S. ___, ___, 104 S.Ct. 3012, 3021, 82 L.Ed.2d 139 (1984).

Therefore, a new trial must determine whether Albers was subjected to cruel and unusual punishment under the "deliberate indifference" standard by defendants' use of excessive force against him. If it is determined that the prison

authorities' conduct did not violate this standard, they are absolved of all liability under § 1983. If an eighth amendment violation is found, there is no qualified immunity defense available.

PENDENT STATE CLAIMS

The district court correctly dismissed Albers' pendent state tort claims because recovery is barred by the Oregon Tort Claims Act. *See*, O.R.S. § 30.265(3)(a).

REVERSED IN PART, AFFIRMED IN PART, and REMANDED.

EUGENE A. WRIGHT, Circuit Judge, dissenting:

I would affirm substantially for the reasons stated by Judge Panner in his excellent opinion below. *Albers v. Whitley*, 546 F. Supp. 726 (D. Or. 1983). I add these comments. I agree with the district judge that: (1) no constitutional rights were violated by the prison officials' use of deadly force during a prison riot, and (2) the prison officials enjoy immunity to Albers' claim for damages.

I. *The Eighth Amendment Claim*

This is the first case in which a federal court has countenanced a cause of action for cruel and unusual punishment arising from a prison disturbance. It is not our function to second guess the prison officials' response to a riot situation. Administration of a prison is "at best an extraordinarily difficult undertaking." *Hudson v. Palmer*, ___U.S. ___, ___, 104 S.Ct. 3194, 3200, 82 L.Ed.2d 393 (1984); *Wolff v. McDonnell*, 418 U.S. 539, 566, 94 S.Ct. 2963, 2979, 41 L.Ed.2d 935 (1974).

The district court viewed the evidence correctly in the light most favorable to the plaintiff and concluded that no triable issue existed because the prison officials responded in good faith to a genuine emergency. *Albers v. Whitley*, 546 F. Supp. 726, 735 (D. Or. 1982) This was a riot. Prisoners were armed with a knife and pieces of furniture. A guard was held hostage. One inmate was reported dead.

Prison officials attempted and failed to achieve a peaceful settlement. They elected not to use tear gas because of the great discomfort it would cause the majority of inmates who had obeyed the cell-in order. *Albers*, 546 F. Supp at 733-34.

Close judicial scrutiny is inappropriate where prison officials react in good faith to a true crisis. *Arroyo v. Schaefer*, 548 F.2d 47, 50 (2d Cir. 1977); *LaBatt v. Twomey*, 513 F.2d 641, 647 (7th Cir. 1975). *See also Pepperling v. Crist*, 678 F.2d 787, 789 (9th Cir. 1982) (extreme deference given to prison officials in matters of internal security). Judge Friendly has observed, "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers violates a prisoner's constitutional rights." *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied*, 414 U.S. 1033, 94 S.Ct. 462, 38 L.Ed.2d 324 (1973).

II. *Qualified Immunity*

Under *Davis v. Scherer*, ___U.S. ___, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984), prison officials enjoy immunity unless, at the time Albers was shot, it was "clearly established" that prison officials could be held liable for using deadly force in quelling a prison riot. The standard is objective and is appropriate for summary disposition by a trial judge. *Harlow v.*

Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). We view the "objective reasonableness of [the] official's conduct as measured by reference to clearly established law." *Davis*, ___ U.S. at ___, 104 S.Ct. at 3018 (quoting *Harlow*, 457 U.S. at 818, 102 S.Ct at 2738).

The majority, however, merges the question of "deliberate indifference" with the question whether a right is "clearly established" for qualified immunity purposes. This incorrectly inserts a subjective element into the determination of an official's immunity. It also transforms qualified immunity from a question of law for the judge, to a question of fact for the jury.

There is no definitive guide as to when a right is "clearly established." *Zweibon v. Mitchell*, 720 F.2d 162, 168-69 (D.C. Cir. 1983). The Supreme Court has indicated that a high standard should be applied in prison cases such as this. In *Davis*, the Court recognized that prison officials routinely make close decisions and that they "should not err always on the side of caution." *Davis*, ___ U.S. at ___, 104 S.Ct. at 3021. Those persons "must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office." *Id.*

No court has awarded damages to a prisoner injured in a prison riot. As evidenced by the divergence of opinion among us on this panel, the constitutional rights of prisoners during a prison riot are not well settled. These rights are not "clearly established" under *Davis*.

The majority's approach is not compelled by *Haygood v. Younger*, 718 F.2d 1472, 1483-84 (9th Cir. 1983), *vacated*, 729 F.2d 613 (9th Cir. 1984). A vacated decision has no vitality as precedent. *See, Hill v. Western Electric Co., Inc.* 672 F.2d 381, 387 (4th Cir. 1982); *cert. denied*, 459 U.S. 981, 103 S.Ct. 318, 74 L.Ed.2d 294 (1982).

I would affirm.

APPENDIX B

Gerald ALBERS, Plaintiff,

v.

Harol WHITLEY, et al., Defendants.

Civ. A. No. 81-517-PA.

United States District Court,

D. Oregon.

Aug. 31, 1982.

[Names of counsel omitted in printing]

OPINION

PANNER, District Judge.

This is a civil rights action against individual corrections officers arising out of a disturbance in "A" Block of the Oregon State Penitentiary on June 27, 1980. Plaintiff was injured by shotgun fire. He alleged that he was deprived of rights under the eighth and fourteenth amendments. Additionally, he appended state tort claims for assault and battery and negligence.

At the conclusion of a jury trial, I directed a verdict for the defendants. I ruled that there was not sufficient evidence presented from which a jury could conclude that plaintiff was deprived of any constitutional rights. Alternatively, I ruled that the defendants were immune from damages. I rejected plaintiff's pendent claims. Entry of judgment has been withheld pending this opinion.

STANDARDS FOR DIRECTED VERDICT

A directed verdict is appropriate if the evidence permits only one reasonable conclusion as to the verdict. *California Computer Products v. I.B.M.*, 613 F.2d 727, 732-33 (9th Cir. 1979). To reach such a conclusion, I must consider all the evidence but must do so in a light most favorable to the nonmovant. *Autohaus Brugger, Inc. v. Saab Motors, Inc.*, 567 F.2d 901, 909 (9th Cir.), *cert. denied*, 436 U.S. 946, 98 S.Ct. 2848, 56 L.Ed.2d 787 (1978). I cannot weigh the evidence presented nor consider the credibility of witnesses. All reasonable inferences must be drawn in favor of the nonmovant. *Fountila v. Carter*, 571 F.2d 487, 490 (9th Cir. 1978); *Kay v. Cessna Aircraft Co.*, 548 F.2d 1370, 1372 (9th Cir. 1977). Finally, I note this circuit's admonition that a motion for directed verdict should be granted only "where there is no substantial (or 'believable') evidence to support" any other verdict. *Autohaus Brugger*, *supra* at 910.

FACTS

Plaintiff Gerald Albers was an inmate housed in cellblock "A" at the Oregon State Penitentiary in Salem, Oregon on June 27, 1980. Defendant Whitley was security manager of the penitentiary; defendant Cupp was superintendent; defendant Keeney was an assistant superintendent; and defendant Kennecott was a corrections officer.

Cellblock "A" is an "honor" cell consisting of two tiers and housing for over 200 inmates. Lower tier cells are adjacent to an open area. A stairway leads to the upper tier. A hallway off

the open area leads out of the cellblock. The lower tier cells are separated from the open area by floor-to-ceiling bars and a barred door. On each tier are two opposing rows of cells. Open floor separates the lower tier rows of cells. Open space separates the rows on the upper tier. While it is possible to jump and climb between tiers, the stairway offers the only practicable way for inmates to reach the upper tier. Prison officers may enter cellblock "A" from either end, on either tier and can control entry into either tier by means of barred walkways.

Inmates housed in cellblock "A" have good disciplinary records and accordingly, enjoy certain privileges that are denied the rest of the prison population. Significantly, cellblock "A" inmates are allowed more time outside their cells. Normal "cell-in" time for cellblock "A" is 11:00 p.m. on weekdays and midnight on weekends.

On Friday night, June 27, 1980, several cellblock "A" inmates became upset over perceived mistreatment of other inmates who were being escorted by guards to the prison's segregation and isolation building. Some inmates verbally expressed their agitation believing there was unnecessary force used by the guards in escorting the prisoners.

Corrections officers Fitts and Kemper were on duty in cellblock "A" on June 27, 1980. At approximately 9:15 p.m., Officer Kemper received a call. He was instructed to order all inmates in cellblock "A" to return to their cells. This cell-in order was apparently due to the commotion and tense mood of the inmates. Accordingly, Kemper issued the order for all

inmates to return to their cells. At that time, he was standing in the open area adjacent to the lower tier. Fitts was nearby. Plaintiff was in his upper tier cell #274.

The cell-in order was met with resistance. Several inmates demanded to know the reason for the order. One inmate, Richard Klenk, became particularly upset. Klenk jumped from the second tier and confronted and assaulted Kemper. Kemper left the cellblock but Fitts remained. Shortly after Kemper left, Klenk and other inmates began to break furniture. Two inmates escorted Fitts from the open area into an office, stating that Fitts would be protected from harm there.

Kemper informed the control center of the disturbance in cellblock "A". Defendants Cupp and Kenny [*sic*] were immediately notified and both proceeded to the penitentiary. Defendant Whitley was also advised of the disturbance and went to cellblock "A".

Whitley entered cellblock "A", climbing over broken furniture placed by inmates in the hallway leading into the cellblock. Whitley spoke with inmate Klenk. Whitley agreed to allow four inmates to be escorted to the segregation and isolation building to observe the condition of the inmates who were taken there earlier. Whitley left cellblock "A" with those four inmates. The four later reported back to fellow inmates in cellblock "A" that the prisoners in segregation and isolation were not harmed but were intoxicated. This information did not quell the disturbance.

Whitley returned to the cellblock and asked Klenk to allow him to see Officer Fitts. Klenk brought Fitts to Whitley who observed that Fitts was not harmed. Fitts was returned to the office but shortly thereafter was taken to cell #201 on the upper tier.

Meanwhile, Whitley left the cellblock and began organizing an assault squad. At some point, Whitley and others were aware that Klenk had secured a homemade knife. Klenk had also informed Whitley that one inmate had been killed and that others would die.

Whitley returned to the cellblock for a third time. Klenk repeated his earlier demand to meet with media representatives. Whitley again requested to see Fitts. Klenk escorted Whitley to cell #201. Fitts reported that he was unharmed. Several inmates in and around cell #201 stated to Whitley that they would protect Fitts from physical harm. Whitley left the cellblock, noting that a barricade had been constructed that limited access into the cellblock.

Whitley advised defendants Kenney and Cupp of the events and his assessment of the situation. It was agreed that tear gas could not be utilized. Cupp thereupon ordered Whitley to take a squad into "A" block armed with shotguns. Cupp ordered that the squad be instructed to "shoot low."

During these events, plaintiff left his cell on the second tier. While this was in violation of the "cell-in" order, there was evidence that plaintiff was requested by other inmates to

leave his cell and aid in quelling the disturbance. Plaintiff proceeded down the stairs from the upper tier to the open area in front of the lower tier cells. Although a disputed fact, I accept for purposes of analyzing the evidence, that the steel-barred door which provides access from the lower tier to the open area was closed and locked. I also accept as true, plaintiff's statement that he spoke with Whitley shortly after Whitley spoke with Fitts in cell #201. Plaintiff asked Whitley whether the locked door on the lower tier could be opened to allow inmates, including several elderly inmates, to leave that area until the commotion died down. Whitley responded that he would find out and return with the key.

By this point, the assault group had assembled outside the barricaded entry way. Shotguns had been assigned to Kennecott and Officers Jackson and Smith. Acting under Cupp's orders, the guns were loaded with #6 shot. A second group of officers, without firearms, were assigned to immediately follow the assault group across the barricade. Whitley instructed Kennecott to follow him across the barricade and to fire a warning shot on entry and to shoot low at anyone heading up the stairs toward #201. At about 10:30 p.m., Whitley entered the cellblock, unarmed, followed by Kennecott, Jackson and Smith, all armed with shotguns.

Plaintiff was waiting at the bottom of the stairway for Whitley to return with the key. When Whitley did return, plaintiff asked about the key. The events that followed are in dispute. Viewed in a light most favorable to plaintiff, there was evidence that Whitley screamed "shoot these bastards"

and began running toward the stairs in pursuit of inmate Klenk, without ordering plaintiff to return to his cell. While some lights were broken, there was evidence that the area was sufficiently lighted to enable plaintiff to be recognized and distinguished from other inmates.

Kennecott followed Whitley over the barricade and discharged a warning shot into the wall opposite the cellblock entrance. Once over the barricade, Kennecott discharged a second shot which struck a post near the stairway.

Meanwhile, Whitley had chased Klenk up the stairs toward cell #201. At the doorway to cell #201, Whitley caught and, with the aid of several inmates, subdued Klenk. Concurrently, plaintiff began running up the stairs behind Whitley. Kennecott fired a third shot which struck plaintiff in his knee. After being shot, plaintiff crawled up the stairs and sought shelter in a mop room at the top of the stairs. After Officer Fitts was released unharmed, corrections personnel began to care for the wounded inmates. In addition to plaintiff, another inmate was injured by gunshot on the stairs. Other inmates on the lower tier were also struck by gunshot.

Plaintiff does not claim that his medical care was inadequate. It is, therefore, not detailed. Plaintiff sustained severe nerve damage to his lower left leg, with residual paralysis, and

mental and emotional distress.

ISSUES

1. Was there evidence from which a jury could conclude that plaintiff was deprived of any rights, privileges, or immunities secured by the Constitution?

2. Alternatively, are defendants immune from money damages? and

3. Was there evidence from which a jury could conclude that defendants are liable for assault and battery and negligence under state law?

DISCUSSION

I. CONSTITUTIONAL RIGHTS.

Lawful imprisonment necessarily limits individual rights and privileges. *Price v. Johnson*, 334 U.S. 266, 285, 68 S.Ct. 1049, 1060, 92 L.Ed. 1356 (1948). By the very nature of confinement, a prisoner is deprived of certain liberties. Nevertheless, convicts do not forfeit all constitutional protections. *Bell v. Wolfish*, 441 U.S. 520, 545, 99 S.Ct. 1861, 1877, 60 L.Ed.2d 447 (1979). "There is no iron curtain drawn between the Constitution and the prisons of this country." *Wolff v. McDonnell*, 418 U.S. 539, 555, 94 S.Ct. 2963, 2974, 41 L.Ed.2d 935 (1974).

Section 1983 provides a civil remedy for alleged constitutional deprivations. To establish a prima facie case, plaintiff need only prove that the conduct was committed by a person acting under color of state law, and that the conduct in question deprived plaintiff of rights secured by the Constitution. It is not necessary to allege or prove the defendants'

state of mind. *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981).

All defendants were acting under color of state law. Plaintiff's proof was therefore limited to the issue of whether defendants' conduct deprived him of any rights secured by the Constitution.

Based upon the events of the night of June 27, 1980, plaintiff argues that defendants violated his constitutional rights guaranteed by the eighth and fourteenth amendments.[1] Underlying that claim is plaintiff's theory that defendants used unreasonable, excessive force under the circumstances. While plaintiff does not question defendants'

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[1] I do not understand plaintiff to assert an independent violation of fourteenth amendment due process. To prevail on such a theory, plaintiff must prove that he was divested of a protected interest without the due process of law. While plaintiff undoubtedly had liberty and life interest at stake, it is unclear what process was due him. "Once it is determined that due process applies, the question remains what process is due." *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972).

The right to be free from infliction of harm without due process as guaranteed by the fourteenth amendment usually applies to pretrial detainees. *E.g., Arroyo v. Schaefer*, 548 F.2d 47, 49-50 (2d Cir. 1977). In limited instances, a regulation or statute may create a due process interest enforceable by a prisoner. *E.g., Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974); *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979). Here, no regulation or statute was cited which would give plaintiff an expectation of a due process hearing prior to the alleged deprivation of liberty. *See Hayward v. Procunier*, 629 F.2d 599, 601 (9th Cir. 1980), *cert. denied*, 451 U.S. 937, 101 S.Ct. 2015, 68 L.Ed.2d 323 (1981). Furthermore, in the midst of the emergency created by riotous inmates holding a guard hostage, the Constitution simply does not mandate a due process hearing for each inmate potentially affected by remedial action. *Hayward, supra* at 602-03 (no due process right to hearing prior to lockdown of prison). When prison authorities are reacting to emergency situations in an effort to preserve the safety and integrity of the institution, the state's interest in decisive action clearly outweighs the inmates' interest in a prior procedural safeguard. *La Batt v. Twomey*, 513 F.2d 641, 645 (7th Cir. 1975).

responsibilities to quell inmate disturbances and to rescue hostages, plaintiff argues that action short of deadly force should have been used. Plaintiff argues, therefore, that defendants' use of deadly force deprived him of rights secured by the Constitution.

The unjustified striking, beating, or infliction of bodily harm upon a prisoner gives rise to liability under § 1983. *King v. Blankenship*, 636 F.2d 70, 72 (4th Cir. 1980). The eighth amendment, applicable to the states through the fourteenth amendment, prohibits the infliction of cruel and unusual punishment. *Robinson v. State of California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962). Intent to punish a prisoner is not a necessary component of an eighth amendment claim under § 1983. *Spain v. Procunier*, 600 F.2d 189, 197 (9th Cir. 1979); *Haygood v. Younger*, 527 F. Supp 808, 820 (E.D. Cal. 1981). What is required in a § 1983 action based on the eighth amendment is that the defendants caused harm upon the plaintiff that was cruel and unusual.

While the use of excessive force may give rise to liability under § 1983, the statute cannot be interpreted to impose liability for breach of duties of care arising out of tort law. *Baker v. McCollan*, 443 U.S. 137, 146, 99 S.Ct. 2689, 2695, 61 L.Ed.2d 433 (1979). "[N]ot every instance of the use of excessive force gives rise to a cause of action under § 1983 merely because it gives rise to a cause of action under state tort law or is prosecutable under criminal assault and battery law." *King v. Blankenship, supra*, 636 F.2d at 73. To be

actionable under § 1983, the alleged excessive use of force must rise to "constitutional dimensions." *Pritchard v. Perry*, 508 F.2d 423, 426 (4th Cir. 1975). *See also, Johnson v. Glick*, 481 F.2d 1028, 1033-34 (2d Cir.), *cert. denied*, 414 U.S. 1033, 94 S.Ct. 462, 38 L.Ed.2d 324 (1973); *Miller v. Hawver*, 474 F. Supp. 441 (D. Colo. 1979). As Judge Friendly observed in *Johnson v. Glick, supra*, 481 F.2d at 1033, "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights."

In determining whether this constitutional line has been crossed in this case, I must examine such factors as the need for application of force, the relationship between the need and amount of force that was used, and the extent of the injury inflicted. *Johnson v. Glick, supra*, 481 F.2d at 1033. In applying these factors, I bear in mind that the defendants here are not charged with a pattern of practice of conditions usually associated with eighth amendment violation. Here, the cause of action arose from a single, isolated incident, not likely to be repeated. Under those circumstances, courts have shown a general relunctance to judge the actions of jailers in hindsight. *E.g., La Batt v. Twomey*, 513 F.2d 641, 647 (7th Cir. 1975) (institutional lockdown); *Miller v. Hawver*, 474 F. Supp 441, 442-43 (D. Colo. 1979) (physical attack by guards); *Arroyo v. Schaefer*, 548 F.2d 47, 50 (2d Cir. 1977) (tear gas injury); *see also, Cattan v. City of New York*, 523 F. Supp. 598, 600-01 (S.D. N.Y. 1981) (excessive force by police officers). Nevertheless, emergency conditions do not excuse irresponsibility. The infliction of harm to a prisoner may be cruel and unusual even

when applied in pursuit of legitimate objectives, if it goes beyond what is necessary to achieve those objectives. *Ridley v. Leavitt*, 631 F.2d 358, 390 (4th Cir. 1980); *Suits v. Lynch*, 437 F. Supp. 38, 40 (D. Kan. 1977).

Here, the uncontradicted evidence is that defendants were faced with a riot situation. At least one inmate was armed with a knife. Others were armed with pieces of furniture. One inmate was reported dead and others were said by Klenk to be in danger. Inmates had destroyed much of the cellblock furniture and had constructed a barricade. One guard was held hostage and although there is evidence to show that for the most part he was in the hands of sympathetic inmates, there was uncontradicted evidence that the armed inmate threatened to kill the hostage. In response to this situation, defendants utilized deadly force and inflicted upon plaintiff a serious injury.

Prison officials must be free to deal firmly with outbreaks and uncontrolled situations. They must maintain order, discipline and preserve the security of inmates and guards. *Suits v. Lynch*, *supra*, 437 F. Supp. at 40. Jailers are not obliged to await large-scale violence or repeated assaults on inmates or guards before taking action. Indeed, prison officials would be derelict if, after receiving warning of violent action, they waited fulfillment of the threat before responding. *Olgin v. Darnell*, 664 F.2d 107, 109 (5th Cir. 1981). In the setting of a prison emergency such as an inmate riot, where certain remedial measures are necessary, prison officials must, within their discretion, curtail certain rights of prisoners. *Blair v. Finkbeiner*, 402 F. Supp. 1092, 1094-95 (N.D. Ill. 1975). Of

course, while prison officers are to be afforded broad discretion in maintaining order within the prison walls, the discretion is not unlimited. Only reasonable force under the circumstances may lawfully be employed. *Ridley v. Leavitt*, 631 F.2d 358, 360 (4th Cir. 1980); *Martinez v. Rosado*, 614 F.2d 829 (2d Cir. 1980).

Defendants reasonably exhausted attempts to quell the riot through nonforceful means. Three times defendant Whitley entered the cellblock to attempt to calm inmates, disarm inmate Klenk, and to restore order. While there is evidence, viewed in a light most favored to plaintiff, that the general disturbance was subsiding, Whitley's attempt at nonforceful resolution failed. The hostage remained. Klenk had also claimed to have killed one inmate and threatened others. Under these circumstances, I hold that the use of force to quell the riot, rescue the threatened hostage, and restore order to cellblock "A" was reasonable, necessary and proper. No reasonable jury would have concluded otherwise. An issue remains, however, whether the use of deadly force was reasonably proportional to the need for force.

My research disclosed no reported decisions in which an inmate, shot by guards during the quelling of a prison riot, sought damages for alleged violations of constitutional rights. While such shootings have occurred, *e.g.*, *Inmates of Attica v. Rockefeller*, 453 F.2d 12, 15 (2d Cir. 1971), apparently no civil suits were filed.

In *LeBlanc v. Foti*, 487 F. Supp. 272, 275-76 (E.D. La. 1980), the court assumed for purposes of analysis that plaintiff was maced by prison guards when a disturbance broke out

among inmates. The court held that the use of mace by prison guards to quell the disturbance was not unreasonable force under the circumstances. *Accord*, *Clemmons v. Greggs*, 509 F.2d 1338, 1340 (5th Cir.), *cert. denied*, 423 U.S. 946, 96 S.Ct. 360, 46 L.Ed.2d 280 (1975) (use of tear gas to prevent escape held to be reasonable); *Davis v. United States*, 439 F.2d 1118, 1119-20 (8th Cir. 1971) (use of tear gas to quell riot was reasonable).

Here, a decision was made by the defendants not to use tear gas or mace. There was concern whether prison officials could maneuver through the barricade and adminster the gas quickly enough to assure that no harm came to the hostage. There was also concern whether gas would have the necessary effect in the relatively large area of cellblock "A". Gas would cause great discomfort to the majority of inmates who had obeyed the cell-in order and were in their cells. These concerns were reinforced by expert testimony by both sides at trial.

The decision to use deadly force was made after failure of nonforceful settlement and after rejection by officials of the use of gas. The gunshots were loaded with #6 shot which consists of quite small pellets. Instructions were given to shoot low anyone who followed Whitley up the stairs toward cell #201.

Viewing the evidence in favor of plaintiff, the prison officials knew that inmates who had disobeyed the cell-in order might be injured by the shooting. Nevertheless, interests of prisoners must be balanced against those of the prison

institution. *Blair v. Finkbeiner*, *supra*, 402 F. Supp. at 1095. Where prison authorities react to emergency situations and determine that immediate action is necessary to forestall a riot, that determination outweighs the interest of accurately assessing individual culpability before taking precautionary steps. *La Batt v. Twomey*, *supra*, 513 F.2d at 645.

Defendants here were faced with a situation that had extreme potential danger to a hostage guard and to inmates. Possible alternatives to force were reasonably considered and rejected. While plaintiff's experts suggested possible riot formations, tear gas, and sharpshooter alternatives, it would be speculative to conclude that such other alternatives would have been more effective in securing the release of the hostage and the safety of the inmates. The safety of the hostage and the nonrioting inmates was of paramount importance to the defendants.

Prison officers' choice of alternatives available to them in emergency situations must not be unduly hindered by overboard judicial scrutiny, especially on the basis of hindsight. *La Batt v. Twomey*, *supra*, 513 F.2d at 647. Although factually distinguishable, *La Batt*, is highly instructive on the proper degree of judicial review of prison officials' decision-making during emergency situations:

> 'We recognize that present or impending disturbances which might overtax the control capacity of a prison creates a dominant interest in prison authorities being able to act without delay if they feel that delay would endanger the inmate, others, or the prison community. [Citations omitted.] This is so even though the assessment of difficulties may subsequently prove to

> be unfounded . . ." [Citations omitted.] The psychology and social stability of a prison community are foreign to one who is not involved with it on a day-to-day basis. Any attempt to reconstruct, at a later date, the conditions present at the time of dispute, and the dangers then feared by prison authorities, is fraught with perils of misunderstanding and misapprehension.
>
> Accordingly, the standard of review of a challenge to the sufficiency of the basis of emergency response must be generous to the administration. We conclude that, absent a claim of bad faith or mere pretext on the part of prison authorities in the imposition of emergency procedures, the underlying bases of decision must be deemed to lie fully within their expertise and discretion and, accordingly, is insulated from subsequent judicial review.

La Batt, *supra*, 513 F.2d at 647.

Viewing the evidence in a light most favorable to the plaintiff, I hold that defendants' use of deadly force was justified under the unique circumstances of this case. Possible alternatives were considered and reasonably rejected by prison officers. The use of shotguns and specifically the order to shoot low anyone following the unarmed Whitley up the stairs were necessary to protect Whitley, secure the safe release of the hostage and to restore order and discipline. Even in hindsight, it cannot be said that defendants' actions were not reasonably necessary.

Accordingly, applying the factors enumerated in *Johnson v. Glick*, *supra*, 481 F.2d at 1033, I hold that under the circumstances of this case, plaintiff's claims of excessive force do not rise to that "constitutional dimension" sufficient to support a cause of action under § 1983.

II. QUALIFIED IMMUNITY.

Prison officials enjoy a qualified immunity from damages in § 1983 actions. *Procunier v. Navarette*, 434 U.S. 555, 561-62, 98 S.Ct. 855, 859-60, 55 L.Ed.2d 24 (1978). Defendants bear the burden of pleading and proving their entitlement to qualified immunity. *Gomez v. Toledo*, 446 U.S. 635, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980) (pleading); *Harris v. City of Roseburg*, 664 F.2d 1121, 1129 (9th Cir. 1981) (proving). Such immunity is necessary to insulate public officers from vexatious litigation and to allow public officers to take prompt action based on information provided to them by their parties. *Scheuer v. Rhodes*, 416 U.S. 232, 246, 94 S.Ct. 1683, 1691, 40 L.Ed.2d 90 (1974) (state governors); *Wood v. Strickland*, 420 U.S. 308, 319, 95 S.Ct. 992, 999, 43 L.Ed.2d 214 (1975) (school board members). These factors become particularly relevant for prison officers who must exercise an exceedingly broad range of discretion in performing official duties. *Douthit v. Jones*, 619 F.2d 527, 534 (5th Cir. 1980) (dictum).

There is often confusion between a plaintiff's prima facie case and defendants' affirmative defense of qualified immunity. This is because the evidence the plaintiff is required to produce to establish a prima facie case is precisely the type of evidence that makes the defendants' immunity less likely. *Gullatte v. Potts*, 654 F.2d 1007, 1014-15 (5th Cir. 1981). It is not unusual for courts to "skip" over the constitutional claims and consider the immunity issue since a finding of qualified immunity moots the effect of the constitutional violation. *E.g.*, *Procunier v. Navarette*, *supra*; *Baker v. Nor-*

man, 651 F.2d 1107, 1124 (5th Cir. 1981)). While I hold that defendants did not deprive plaintiff of any constitutional rights, I find it appropriate to analyze defendants' affirmative defense of qualified immunity. I hold as an alternative grounds in support of the directed verdict that defendants are immune from damages.

Under the qualified immunity doctrine, a public officer performing acts in the course of official conduct is insulated from damage suits if (1) at the time and in light of circumstances there existed reasonable grounds for the belief that the action was appropriate; and (2) the officer acted in good faith. *Harris v. City of Roseburg, supra*, 664 F.2d at 1128. Courts have determined that this two-prong analysis calls for both an objective and subjective evaluation of official conduct. *E.g., Williams v. Treen*, 671 F.2d 892, 896 (5th Cir. 1982); *Gullatte v. Potts, supra*, 654 F.2d at 1012-14; *Harris v. City of Roseburg, supra*, 664 F.2d at 1127-28; *Lock v. Jenkins*, 641 F.2d 488, 499-500 (7th Cir. 1981). *See also, Wood v. Strickland, supra*, 420 U.S. at 321-22, 95 S.Ct. at 1000-01; *Procenier v. Nararette, supra*, 434 U.S. at 562-66, 94 S.Ct. at 859-62. Under the subjective test, an official forfeits his immunity when he acts with malicious intent to cause a deprivation of constitutional rights. *Williams v. Treen, supra*, 671 F.2d at 896. An official must prove that "he was acting sincerely and with the belief that he was doing right, not knowing that his official action would violate [plaintiff's] constitutional rights . . . ." *Harris v. City of Roseburg, supra* 664 F.2d at 1128. Under the objective standard an official,

even if acting in the sincere subjective belief that actions taken are right, loses the cloak of qualified immunity if the actions taken contravene settled, indisputable law. *Williams v. Treen, supra*, 671 F.2d at 896. Defendants must show that they should not have reasonably known that their official actions would violate plaintiff's constitutional rights. *Harris v. City of Roseburg, supra*, 664 F.2d at 1128.

The Supeme Court recently re-examined the qualified or "good faith" immunity defense. In *Harlow & Butterfield v. Fitzgerald*, ___U.S. ___, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), the Court reviewed the traditional "objective" and "subjective" standards and greatly limited the use of the subjective analysis. Relying on its past decisions in *Procunier v. Navarette, supra*, 434 U.S. at 565, 94 S.Ct. at 861 and *Wood v. Strickland, supra*, 420 U.S. at 321, 95 S.Ct. at 1000, the Court held that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow, supra*, 102 S.Ct. at 2738. The Court concluded that judicial inquiry into subjective motivation was particularly disruptive of effective government and prevented the pretrial resolution of many insubstantial claims. *Id.*

The Court thus defined the limits of qualified immunity essentially in objective terms, concluding that such a limitation would adequately safeguard individual statutory and constitutional rights. "Where an official could be expected to

know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action. But where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action 'taken with independence and without fear of consequences." *Pierson v. Ray*, 386 U.S. 547, 554 [87 S.Ct. 1213, 1217-18, 18 L.Ed.2d 288] (1967)" (footnote omitted). *Harlow*, *supra*, 102 S.Ct. at 2739.

Applying these standards to the facts of this case, I hold that defendants are immune from damages. Defendants are liable only if they actually knew or should have known that their action violated plaintiff's constitutional rights. *Harlow*, *supra*, 102 S.Ct. at 2739; *Sequin v. Eide*, 645 F.2d 804, 812 (9th Cir. 1981). Only a reasonable belief is necessary since officials cannot be expected to predict the course of constitutional law upon which federal judges often differ. *Smiddy v. Varney*, 665 F.2d 261, 266 (9th Cir. 1981), citing *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 456 F.2d 1339, 1349 (2d Cir. 1972) (Lumbard, J., concurring).

The issue of qualified immunity is generally a question for the jury. *Beard v. Udall*, 648 F.2d 1264, 1272 (9th Cir. 1981). Nevertheless, if the evidence permits only one reasonable conclusion, a directed verdict is appropriate. Here, there was no clearly established constitutional right to be free from the use of deadly force administered for the necessary purpose of quelling a prison riot and rescuing a hostage. While injuries had undoubtedly occurred under similar circumstances no

reported cases established the right of a prisoner to recover damages for the alleged constitutional violation. In contrast, case authority at the time of this incident clearly provided great discretion to prison officials to take necessary action to maintain and control prison situations.[2]

I hold that defendants could not have reasonably known that actions taken to quell the disturbance and rescue the hostage would violate any prisoner's constitutional rights. Therefore, applying the objective test mandated by *Harlow*, *supra*, I hold that defendants are entitled to a qualified immunity from damages. No reasonable jury would conclude otherwise.

III. PENDENT CLAIMS.

A. *Jurisdiction.*

Federal courts may exercise jurisdiction over pendent state claims that arise from "a common nucleus of operative facts." *United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966). When federal claims are dismissed prior to trial, pendent state claims with few exceptions must also fail. *Gibbs*, *supra* at 726, 86 S.Ct. at 1139; *Wren v. Sletten Construction Co.*, 654 F.2d 529, 536 (9th Cir.

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[2] *E.g.*, *Arroyo v. Schaefer*, 548 F.2d 47 (2d Cir. 1977); *La Batt v. Twomey*, 513 F.2d 641 (7th Cir. 1975); *Clemmons v. Greggs*, 509 F.2d 1338 (5th Cir.), *cert. denied*, 423 U.S. 946, 96 S.Ct. 360, 46 L.Ed.2d 280 (1975); *Pritchard v. Perry*, 508 F.2d 423 (4th Cir. 1975); *Johnson v. Glick*, 481 F.2d 1028 (2d Cir.), *cert. denied*, 414 U.S. 1033, 94 S.Ct. 462, 38 L.Ed.2d 324 (1973); *Davis v. United States*, 439 F.2d 1118 (8th Cir. 1971; *LaBlanc v. Foti*, 487 F. Supp. 272 (E.D. La. 1980); *Miller v. Hawver*, 474 F. Supp. 441 (D. Colo. 1979); *Suits v. Lynch*, 437 F. Supp. 38 (D. Kan. 1977); *Blair v. Finkbeiner*, 402 F. Supp. 1092 (N.D. Ill. 1975). *See generally*, discussion in Section I, *supra*.

1981). Nonetheless, it is not necessary to have continual jurisdiction over federal claims as a prerequisite to resolution of pendent claims. *Meyer v. California and Hawaiian Sugar Co.*, 662 F.2d 637, 640 (9th Cir. 1981). Where there has been a trial of the operative facts underlying both federal and state claims, a "decent regard for economical and sensible use of the state and federal judicial machinery and considerations of expense to the litigants" requires a court to decide the pendent claims even though the federal ones fail. *McLearn v. Cowen & Co.*, 660 F.2d 845, 848 (2d Cir. 1981) (dictum). Once a trial is held, dismissal of the pendent claims should be made only if the federal cause of action was so insubstantial and devoid of merit that there is obviously no federal jurisdiction. *Traver v. Meshriy*, 627 F.2d 934, 939 (9th Cir. 1980).

I hold that the federal claims in this case were not frivolous nor insubstantial. While the federal claims ultimately were not meritorious, they were sufficient to confer jurisdiction. Accordingly, I exercise my discretion to reach the merits of the pendent state claims. *Rosado v. Wyman*, 397 U.S. 397, 404-05, 90 S.Ct. 1207, 1213-14, 25 L.Ed.2d 442 (1970).

B. *Merits*

Plaintiff asserted two pendent state claims. First, plaintiff alleged that defendants were negligent. To state a cause of action in negligence under Oregon law, plaintiff must allege that defendants owed a duty, that defendant breached that duty, and that the breach was the cause in fact of some legally cognizable damage to plaintiff. *Brennan v. City of Eugene*, 285

Or. 401, 405, 591 P.2d 719, 722 (1979). Second, plaintiff alleged that defendants committed an assault and battery. Under Oregon law, assault is an intentional attempt to do violence to another person. *Cook v. Kinzua Pine Mills Company*, 207 Or. 34, 47, 293 P.2d 717, 723 (1956). Battery is the voluntary act which causes intentionally harmful or offensive contact with another. *Baker v. Baza'r, Inc.*, 275 Or. 245, 249, 551 P.2d 1269, 1271 (1969).

Even assuming that plaintiff can prove the necessary elements to recovery for these alleged tort claims, I hold that recovery is barred by the Oregon Tort Claims Act. Or. Rev. Stat. § 30.265(3)(e) provides that every public body and its officers acting within the scope of their employment are immune from the liability for any claims arising out of riots, civil commotion or mob actions. The immunity further extends to any act or omission in connection with the prevention of riots.

Plaintiff argues that the statute provides only government immunity and not employee immunity. Plaintiff contends that Or. Rev. Stat. § 30.265 applies only to the financial liability of the state for actions taken by the public bodies and by their employees as officials within the scope of their employment. Thus, immunity would not extend to employees who are sued as individuals based on personal, tortious conduct.

Or. Rev. Stat. § 30.265(3) does not bar suit against state officers who commit torts while acting outside the scope of their employment or duties. *Dickens v. DeBolt*, 288 Or. 3,

10-12, 602 P.2d 246, 250-51 (1979) (police officer not immune for acts taken outside scope of employment). Nonetheless, that exception does not apply here. Plaintiff specifically alleges that defendants acted by virtue of their vested authority and in their official capacities. There was no evidence to the contrary.

Plaintiff argues that no recovery is sought against the public body. Under the Oregon Tort Claims Act, the public body is liable for the torts of its employees acting within the scope of their employment. Or. Rev. Stat. § 30.265(1). The public body has an obligation to defend its employees in such civil actions and, if necessary, to indemnify them. *Id.* Here, the state legislature chose not to waive immuity for officers acting within the scope of their employment for claims arising out of a riot.

Plaintiff's remaining arguments against the application of immunity are considered and rejected.[3] Accordingly, plain-

[3] Plaintiff argues that the affirmative defense of immunity was not properly raised. I find, however, that the Answer alleges as a "Third Affirmative Answer and Defense" that defendants are immune from liability as a matter of law. Plaintiff also argues that application of Or. Rev. Stat. § 30.265(3)(e) to bar employee liability violates the due process provision of the Oregon Constitution. Oregon Constitution, Art. I, Section 10. That section provides that ". . . every man shall have remedy by due course of law for injury done to him and his person, property or reputation."

Article I, Section 10 of the Oregon Constitution was historically directed against denying a remedy for a legal injury to private interest recognized under the common law of torts or property. *American Can Co. v. Oregon Liquor Control Commission*, 15 Or.App. 618, 647, 517 P.2d 691, 705 (1973). Here, plaintiff argues that barring recovery from public employees for actions which, if performed by private individuals might very well be actionable, is a denial of due process under the Oregon Constitution.

The disparate treatment between private and public tortfeasors provided by the Oregon Tort Claims Act has been the subject of prior

(Footnote continued on next page)

tiff's pendent claims for negligence and assault and battery are dismissed.

CONCLUSION

It is unfortunate that an inmate was injured by prison officials attempting to quell a riot and rescue a host-

(Footnote continued from previous page)

constitutional challenge. *E.g., Webb v. Highway Div., et al.*, 56 Or.App. 323, 328, 641 P.2d 1158, 1161 (1982) (equal protection and due process challenge to disparate notice requirements rejected); *Riddle v. Cain*, 54 Or.App. 474, 478-79, 635 P.2d 394, 396, *pet. for review denied*, 292 Or. 334, 644 P.2d 1127 (Or. 1981) (due process challenge to notice requirement rejected); *Brown v. Portland School District #1*, 48 Or.App. 571, 576, 617 P.2d 665, 668 (1980), *rev. on other grounds* 291 Or. 77, 628 P.2d 1183 (1981) (equal protection challenge to notice requirement rejected); and *Edwards v. State, Military Department*, 8 Or.App. 620, 623-25, 494 P.2d 891, 893-94 (1972) (equal protection challenge to immunity for liability of tort claims covered by Workmen's Compensation Law rejected).

Here, although the constitutional challenge differs from the above cases, it must nevertheless be rejected. The purpose of Article I, Section 10 due process provision is "to save from legislative abolishment those jural rights which had become well established prior to the enactment of our Constitution." *Stewart v. Houk*, 127 Or. 589, 591, 271 P. 998, 999 (1928) (invalidating Oregon's first automobile guest statute). Prior to enactment of the Tort Claims Act in 1967, public bodies were immune from all tort liability. *E.g., Bacon v. Harris*, 221 Or. 553, 352 P.2d 472 (1972). Additionally, employees were immune from tort liabi rising from the performance of "discretionary functions." *Jarrett v. . .s*, 235 Or. 51, 54-55, 383 P.2d 995, 997 (1963). By passage of the Oregon Tort Claims Act, the legislature waived immunity with enumerated exceptions. No remedy was abolished. On the contrary, the Act provides redress of grievance which did not before exist. The due process protection of Article I, Section 10 is not proscribed. *See Noonan v. City of Portland*, 161 Or. 213, 88 P.2d 808 (1938) (due process provision does not invalidate an exemption clause in city charter that withholds remedy against city); *Gearin v. Marion County*, 110 Or. 390, 223 P. 929 (1924) (due process provision has no application to a case involving immunity of state or subordinate agency).

age Viewing the evidence in the light most favorable to the plaintiff, however, I hold that plaintiff's civil rights claims must fail. The use of deadly force was justified under the unique circumstances of this case. Alternatively, I hold that defendants have a qualified immunity from damages. Similarly, defendants are immune from liability as to the pendent state claim.

Accordingly, the clerk is directed to enter judgment in favor of defendants.

This opinion shall constitute findings of fact and conclusions of law pursuant to Fed. R. Civ. Pro. 52(a).